Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	**CG Docket No. 04-208**
National Association of State Utility Consumer Advocates' Petition for Declaratory Ruling Regarding Truth -In -Billing	)	

REPLY COMMENTS OF THE STATE OF TEXAS

Introduction

Pursuant to the Notice published by the Commission on June 15, 2004, establishing a comment cycle for the National Association of State Utility Consumer Advocates' Petition for Declaratory Ruling Regarding Truth-In-Billing, and the subsequent Order (DA 04 -1820) of June 24, 2004, the Office of the Attorney General of Texas, Consumer Protection Division, Public Agency Representation Section ("State" or "State of Texas"), files these reply comments on behalf of Texas state agencies and universities. The role of this Section of the Attorney General's Office is to represent the interests of Texas state agencies and universities as consumers of traditionally regulated utility services, including telecommunications services.

Comments

In response to the National Association of State Utility Consumer Advocates ("NASUCA") petition for a declaratory ruling, many telecommunications carriers filed comments in opposition to the relief requested in the petition. The substantive reasons for the carrier opposition can be broadly categorized into three areas. (We do not address in our

reply comments the suggestions made by some carriers that the petition filed by NASUCA is an improper *procedural* mechanism, as we believe this Commission has ample authority to address the issues raised on its own authority.) The primary reasons given by carriers, broadly stated, are: 1) carriers contend that they are complying with the existing law and regulations; 2) carriers contend that their line item surcharges are not misleading or are in some way a service to consumers in that they provide consumers additional information about their bills; and 3) carriers have a First Amendment right to impose and label surcharges in whatever manner they choose.

Compliance with Existing Law and Regulations Is Not The Issue

Many carriers take the position that they are in compliance with the current law on billing, and therefore no further action is needed. (S*ee* Comments of Verizon, AT&T Corp., MCI, Inc., and Cingular Wireless.) Even assuming, without admitting, that it is true that all carriers are in total compliance with the FCC's Truth - in - Billing Order and Sections 201 and 202 of the Communications Act, this position simply does not address the issues raised by NASUCA in its petition or in our initial Comments. It merely reenforces our position that additional effort is needed to address the surcharge issue. As we stated in our initial comments, we are constantly confronted with a myriad of new surcharges, or new names for pre-existing surcharges, some of which *appear to be government imposed, but in fact are not actually so*, and others of which are being billed in contravention of statutes, regulations or the state's contractual relationships with its vendors of telecommunications services. The fact that this can happen while carriers may be in technical compliance with the existing requirements reflects that those existing requirements are insufficient, and that the relief requested by

NASUCA is needed to prevent the imposition of surcharges that are not government-related in any sense other than that they are attempts by the carriers to recover the various sorts of regulatory operating expenses incurred by any other business.

The Surcharges Do Not Provide Consumers Useful Information and Are Misleading or Deceptive to the Extent That They Appear to Be Government Mandated Fees

The statement made by some of the carriers that their surcharges provide consumers additional or useful information does not resolve the issue of the relevance or meaningfulness of the information that is actually provided, or the impression that is created by the names of the fees. (*See* Comments of Verizon, AT&T Wireless, and AT&T Corp.) The names of the surcharges themselves ("regulatory assessment fee", "regulatory cost recovery fee") appear to be related to government regulations and disclose nothing to consumers about what costs are in fact at issue. The telecommunications industry, like many others, is subject to legal and regulatory requirements unique to the industry, as well as to those requirements which apply to all businesses operating in particular jurisdictions. The names of the fees and explanations, to the extent they are provided, almost never provide sufficient information to determine precisely which expenses are being recovered. Further, the bills themselves do not provide an explanation of a surcharge at the point where it actually appears on the bill, as most bill formatting is not designed to allow for this. To the extent that any explanations are to be found on the bill at all, they are in tiny font elsewhere on the bill. Sometimes, the customer is referred to a website or telephone number for additional information, and even then receives only a vague explanation of what expenses are being recovered. To take one example, the explanation finally provided by AT&T Wireless for its Regulatory Programs Fee is that it "is not a tax or government required charge. It is an additional monthly charge

created, assessed and collected by AT&T Wireless." Comments of Consumers Union at 3. This explanation tells the consumer absolutely nothing about what expenses this fee is intended to recover or why the consumer should not simply consider it to be a unilateral rate increase, because it is admittedly not a "government required charge." Such explanations are confusing and many others also fail to fully explain what expenses are actually included in the surcharge.

As we stated in our initial Comments, the Texas Deceptive Trade Practices Act prohibits false, misleading and deceptive acts and practices in the conduct of trade and commerce.[1] Any "fee " imposed which is not mandatory potentially creates a misleading impression in the consumer's mind that the carrier had no choice but to impose it. To purportedly provide consumers additional helpful information by imposing line item "regulatory" fees, particularly with limited or no explanation of the purpose of the fees, is not helpful at all, and potentially creates just such an impression.

Finally, to the extent that carriers advertise prices which do not include such non-mandatory fees, accurate price comparisons for consumers becomes difficult or impossible.

There Is No First Amendment Right to Misleading Surcharges

Several carriers have asserted a First Amendment right to their surcharges. (*See* Comments of Verizon, MCI, Inc., CTIA.) However, it is absolutely clear that false, misleading or deceptive speech is not protected and that the First Amendment applies only if the speech is not misleading. *Greater New Orleans Broadcasting Assn. v. United States*, 527 U.S. 173, 119 S. Ct. 1973, 144 L. Ed. 2d 161 (1999). Such commercial speech is therefore not protected to the extent that the speech at issue creates a misleading or deceptive impression in the mind of the

[1] TEX. BUS. & COM. CODE § 17.41 *et seq*. (Vernon 1987 & Supp. 2004).

consumer. Further, the State has no issue with the rights of carriers to recover their costs of doing business through their normal rates and prices for services. This is how any other business recovers its expenses. The issue of concern to the State is the impression that is created that these costs *must* be recovered through a fee or surcharge that is in some way mandated by a government authority. Carriers have no protected right to create such an impression with any surcharge.

Conclusion

Finally, as NASUCA has stated, "[i]t would be administratively impossible to look at each carrier or each carrier's fee, to determine whether the fee is sufficiently and accurately described, whether consumers are adequately informed of the fee, or whether the fee reasonably recovers the cost incurred by the carrier in complying with the regulatory program(s) to which the fee is attributed." NASUCA Petition at 23-24.

The solution is for the Commission to prohibit all carriers under FCC jurisdiction from imposing any separate monthly fees, line items or surcharges unless:

(a) such charge is mandated by federal, state or local law, or governmental authority; and

(b) the amount of such charge conforms to the amount expressly authorized by federal, state, or local law or governmental authority.

The State of Texas appreciates the opportunity to file reply comments in this important proceeding.

Dated: August 13, 2004

Respectfully submitted,

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Certificate of Service

I certify that a copy of these comments is being served on or before August 13, 2004 by regular or overnight mail, fax, or via e-mail on the Commission Secretary and other personnel required by the public notice.

Roger B. Borgelt

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